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SKETCHES
OF THE
CHARACTERS
OF
THE HON. THOMAS ERSKINE, K
AND
JAMES MINGAY, ESQ.
INTERSPERSED WITH
ANECDOTES
AND
PROFESSIONAL STRICTURES.

London:

PRINTED FOR THE EDITOR;
And Sold by KEARSLEY, No. 46, Fleet Street;
And SOUTHERN, No. 27, St. James's Street.

1794.

172

ERRATA.

Page 9. for "Æschenes," read "Æschines."
Page 20. for "stified," read, "fifted."



PREFACE.

ONE Volume of "Law Characters" has been already presented to, and favourably received by, the Public. Several other eminent names are preparing for the press, and will shortly be published, making (together with the present) a second handsome octavo Volume.

The Author trusts, that at a time when all Europe is convulsed, and England feels the principal shock, no apology will be necessary, for introducing to public notice,

the history of men, who are ambitious of acting public parts, and whose integrity, and ability, entitle them to their Country's confidence; he sincerely wishes that others of his fellow countrymen would imitate his example, and enable the public, to proportion their esteem or hatred, to the tenor of the Lives of popular Candidates, instead of being any longer misled by idle, time-serving professions.

N. B. Any Information respecting eminent Characters at the Bar, addressed to the Editor, at Mr. SOUTHERN'S, Bookseller, No. 27, St. James's Street, will be thankfully received.

THE HONOURABLE

THOMAS ERSKINE.

While thro' all the lapse
Of ages, Albion's distinguish'd sons, to thwart
The tyrant's threat'ning efforts, have aris'n
With blushes kindled at the vestal flame
Of honour; with the liberal love of law;
Unblemish'd faith; the high transmitted sense
Of equity; and all the glowing soul
That lives in truth and feeling;

Such thy praise,
O ERSKINE, brightest of those sons! adorn'd
With laurels that outvie the Grecian palm,
Victor in British Eloquence! in vain
The sterner terrors of a MANSFIELD's eye
Frown'd on thy firmness, tho' the patriarch Judge
Sinking thro' venerable years and sage
In legal wisdom, an attentive awe
Inspir'd, the rights of injur'd Britons claim'd
Thy deeper reverence!

POLWHELE'S ENGLISH ORATOR.

MANKIND in general seem urged
by a kind of instinct to pursue the na-
tural bias of their genius, and when
happily not diverted from their course,

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are, most commonly observed to attain the favoured object of pursuit, with credit to themselves, and honor to their country. HOMER and VIRGIL would scarcely have attained superlative eminence, but as Poets, DEMOSTHENES and CICERO, had probably been rivalled in any other pursuit but that of eloquence. The strong innate impulse of feeling, suggested their respective paths, and they followed them with unerring steps, to the very summit of the Temple of Fame. The Subject of these strictures, probably, could he retrace the first dawnings of youthful inclination, felt similar impulsive emotions; like MANSFIELD, declaimed almost in infancy, upon his native mountains, and anticipated those oratorical laurels that have since so profusely adorned him. Other views, nevertheless, under the influence of other guides, had, it seems, struck out for him, a very different plan of life; he who is now, supreme in oratory, the Leader and delight of our Courts of Justice,

Justice, who never fails to command and charm the attention of his hearers, was destined by the ill-judged election of his friends, to a life of military warfare. It is certain he continued long enough in the sea service, to attain the rank of a Lieutenant; thus the sword, and not the gown, was the symbol, that by some unaccountable caprice of fortune, or great want of discernment in his advisers, first decorated him, (who is far beyond the reach of *living* competition) the first Orator of the British Bar, and certainly, in the foremost rank of the greatest Orators in the world: He who now directs the whole artillery of advocatorial eloquence in Westminster-hall, was destined to hurl the thunder of the British Navy,—to command on the ocean as an officer, who now commands with Imperial sway, in the campaigns of the Bar; and in the war of words, stands far aloof without an equal, without any rival to dispute his prowess, or single competitor that

can sustain the unequal conflict. He unites the strength and courage of AJAX, with the wisdom, policy, and eloquence, of ULYSSES.

Even in this situation of life, (the most unfavourable possible to classic and oratorical attainments) Mr. ERSKINE'S ardour in the pursuit of knowledge, and promptitude in *agitating* any matter casually in dispute, is said to have marked the prominent feature of his mind, and the public papers of the times, certainly stood indebted to him, for numerous performances both of attack and defence, in matters that respected his then Profession. The study of Law (as a Profession) was the object of Mr. ERSKINE'S application, much later in life than is usual, but when once earnestly adopted, in that view it was unremittingly pursued, with a degree of zealous ardour and vigorous application, altogether without a parallel. See note (a).

Of

Of the circumstances and history of Mr. ERSKINE'S private life, the writer of these sheets pretends to no other knowledge, or better information, than that which rests on the slender foundation of vague report, which has certainly said, that the early part of it has been chequered with much variety, and no inconsiderable embarrassments, from the effect of a very parsimonious income, joined to a liberal and lively disposition. The younger branches of a Scotch family, are seldom rich ;—Mr. ERSKINE finding his circumstances very inadequate to support the gaiety and expence of a military life, and harrassed, as it has been said, by many debts that line of life had occasioned, and, probably, having no great relish for a Profession that afforded him little opportunity of exercising his talents, began seriously to meditate on his affairs, and to take measures for changing his Profession, to one more lucrative, as well as more congenial, to his temper and disposition. It
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has been very confidently reported, that at an age approaching maturity of manhood, his Law studies were not a little interrupted, by the debasing struggles of pecuniary embarrassment, and that these difficulties were only to be removed by uncommon exertions of literary industry, which happily proved the means of procuring him supplies from the Booksellers. These various effusions of his pen, strongly attest the man of genius, and highly cultivated understanding.

In the interval of his keeping commons, he studied Law under the present Mr. Justice BULLER, then in great practice at the Bar, and pre-eminent as a Special Pleader, in whose office he displayed the same unremitting attention, that marked his first entrance into the Profession.

Having laid a sure and solid foundation, in extensive reading, and a great fund

fund of classical knowledge, his more immediate application was directed to oratorical attainments :—For this purpose, as well as the display of those powers he felt himself in full possession of, he was a constant attendant at Coach-makers' hall, where his frequent bold and figurative declamations, drew the attention of the town, extorting boundless approbation, and vociferous applause ; nor was this preparatory mode of application to the Bar, deemed at that time, at all derogatory to the most respectable students : We have seen it productive of the happiest consequences to many, now in the high road to opulence and honor ; perhaps, the rising Race of Pleaders, (when unprepared from disuse, in the arts of popular declamation, and compelled on the spur of the moment, to address a Jury) may have reason to lament, that any change of opinion in this respect, should have ever taken place. The reputation Mr. ERSKINE here obtained for eloquence, with

with his known ardent application to severer studies, an high opinion generally entertained of his great natural abilities, and a lucky circumstance of introduction to a great and popular character of the day, soon gave him the opportunity after which he panted ; and it is but bare justice to say, that, high as was the general expectation entertained of him, it was even surpassed by the effulgence of his merit.

The first prefage of his abilities in the Courts at Westminster, was given in the year, 1776, on behalf of a Captain BAILLIE, charged with a libel by the Earl of SANDWICH, then first Lord of the Admiralty, and one of the Governors of Greenwich Hospital. This speech may justly be considered a model of forensic eloquence.—*See Note (b)*. He, who is now speaking of it, at the distance of nearly twenty years, recollects the inexpressible sensations of pleasure, it afforded him, on the delivery ; and
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he may well say to his admiring reader, as ÆSCHENES did to his Disciple, of the performance of his great rival, DEMOSTHENES, *If you are charmed with the bare reading of it, what would you have said, had you been present and heard him deliver it, with all the animated graces of elocution?*

In this case, our adventurous Advocate distinguished himself as much by his superior confidence, as by his eloquence. While indulging himself in the strain of virulent invective against the Earl of SANDWICH, he was harshly checked by his countryman, the Earl of MANSFIELD; but undaunted, he resumed his discourse, renewed his attack with additional vigour, and unabated severity, and nobly spurned the idea of yielding to the influence that would have restrained the expression of his indignation.

To this circumstance, Mr. ERSKINE has himself been heard to impute all the success that followed.—On retiring from the Bar, no less than thirty briefs were offered him.

Almost immediately after this business, Mr. ERSKINE was retained—as junior Counsel in the celebrated trial of Admiral KEPPEL, and had a thousand guineas presented him for his exertions on that occasion.

It has been said Admiral KEPPEL could not make his Lawyers understand his sea-terms, in a way absolutely necessary to his defence. Mr. DUNNING and Mr. LEE (the Admiral's Counsel) felt this perplexity, when the former fortunately recollected Mr. ERSKINE, who had attracted his notice by his speech in the affair of Greenwich Hospital; and Mr. ERSKINE having been bred to the sea, proved of infinite service to the Admiral.

His

His bold and figurative diction, coupled with great knowledge, and equal address in the application of it, with the most unwearied exertions of industry, in the discharge of every part in the multiplied and varied task of professional duty, brought him immediately into a great and unprecedented run of practice.

The still more celebrated trial of Lord GEORGE GORDON, in consequence of his conduct in the riots of the year 1780, next attracted the public attention upon Mr. ERSKINE, as his principal defender; and the very able manner in which he discharged his duty, upon that popular and very important occasion, served to *confirm* the opinion of the public, in the very favorable sentiments now so universally entertained of him.—His practice became great, and in the very first line, and has of later years been *immense*, it being the first object of every man involved in law, to retain Mr. ERSKINE, as his Advocate. Mr. ERSKINE occupies

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the line of practice, that formerly fell to the share of the late Lord ASHBURTON, far better known by the highly celebrated name of DUNNING.

Any tolerable degree of excellence in oratory, leads in the English Government, the direct road to wealth and office; yet it is extraordinary that any man, at all worthy of being called an orator, is very rarely found here in any station, and still more rarely at the Bar. Our best speakers, with very few exceptions, discover only a very moderate share of classic learning, and general knowledge, under the guidance of strong natural intellect, unimproved, because undirected to oratorical attainments; a circumstance yet more remarkable, as both the French and Scotch Bars, particularly the former, offer the most admirable models of forensic eloquence.—MANSFIELD, ASHBURTON, YORKE, and LOUGHBOROUGH, were the late exceptions,

tions, at the English Bar; Mr. ERSKINE is the present.

To convey a correct idea of Mr. ERSKINE'S power of oratory, it would be requisite to analyze the best treatises of Rhetoric and Logic; and in doing so, his numerous speeches, on so many and various occasions, would afford abundant and noble specimens of genuine eloquence; few precepts would be found in the one, that wanted examples in the other.

It would be a curious and instructive task, were it possible, with certainty, to trace the cause of this very superior excellence: It is, *perhaps*, in a great measure, imputable to the very sublime ideas he is known to entertain of his profession; the honor and dignity of which he has repeatedly asserted in the most energetic strains; and this is the more probable, as he certainly by no means makes (though every where highly respec-

respectable) the same figure, in the Senate. Mr. ERSKINE seems to have grounded his opinion of his profession, on the sentiments of CICERO, in his book, "*De Oratore*," and like him, to have comprehended within it, every thing great and noble. It certainly possesses very superior advantages. If *utility* ought to be the governing motive of every action, and every design of our lives, can we possibly be employed to better purpose than in the exercise of an art, which enables a man, upon all occasions, to support the interest of his friends, to protect the rights of the stranger, to defend the cause of the injured?—That not only renders him the terror of his open and secret adversaries, but secures him, as it were, by the most firm and permanent guard. Let us observe the *pleasure* that attends the exercise of the persuasive art; a pleasure, which does not arise only once, perhaps, in a whole life, but flows in a perpetual series of gratifications. What a glorious
appear-

appearance does the orator make in public, and what distinguishing respect is paid him, in the Courts of Judicature! Of the whole circle of Art and Sciences, there is no one, which crowns its votaries, with a reputation in any degree, comparable to that of Eloquence. It raises them to wealth, title, distinction, and the highest and most honourable Offices of the State.

Mr. ERSKINE possesses no little enthusiasm in his character, which, however, the plodding sons of laborious diligence (too heavy to pursue its flights) may condemn, is certainly entitled to the palm of honor and utility in public life.—It is from the energy imparted by this principle, that we are to expect the execution of great and noble designs, which soar beyond the ordinary occurrences and characters of life. From such alone, we are to expect original speculations in the regions of moral duty, bold attempts to combat the prejudices

dices of the times, correct the hereditary
 severity of mistaken justice, and stand
 forth in defiance of the malicious impu-
 tations of singularity and visionary fren-
 zy, to brave the malice of venal inhu-
 manity, and plead the cause of an op-
 pressed and injured people. The En-
 thusiast, or the man of strong affections,
 and exuberance of feeling, never ap-
 pears to advantage in the common pro-
 gress of events; but he will shine with
 superior resplendence, whenever his
 energetic feelings are roused into action,
 and he is placed in situations that call
 for exertion,

Beyond the fixed and settled rules,
 Of Vice and Virtue in the schools,
 Beyond the letter of the Law!

To the most extensive practice, the
 most ardent professional zeal and great
 knowledge, Mr. ERSKINE adds a very
 brilliant imagination, and the most ready
 rapid eloquence; others may possess the
 same correctness of *drawing*, but the art
 of

of *colouring*, is his own; others reason, but it is ERSKINE only that captivates the ear, by the charms of sound; he alone conveys his arguments through the medium of the heart; he alone knows how to *affect*, to *rouse*, to *sooth*; at the same time, that from the plenitude of knowledge, he *arms* reasoning; his classical attainments have taught him to *adorn* it, and to conduct it with unerring force, through every avenue to the human heart. By toiling in the mines of literature, he has ingrafted knowledge upon genius; so great is his proficiency in this art, such (when he pleases) is the splendor of his sophisms, in views so infinitely varied, has he the magic power of displaying his facts, and illustrating his arguments, that a prism is necessary to distinguish his colouring, and mark the true stream of light, from the fictitious hues of fancy. His conceptions are vigorous, and his methodical arrangement excellent, and by a happy union of the sister sciences,

(Rhetoric

(Rhetoric and Logic) he is equally able to enforce persuasion, and refute objection—He joins strength to delicacy, precision to copiousness, justness to elegance, and symmetry to variety; his *wing'd* expression aptly represents his thoughts, which have often a boldness that fall with the impetuosity of the thunderbolt. Like CicerO, his ideas are abundant, and his language copious and flowing—it animates and irradiates. His flowery thoughts are often exhibited in the most pleasing light, with the most attractive features, and bewitching attitudes; he plays with the feelings of the heart, as the wind with the waves.

His powers of persuasion are unequalled, his sources of knowledge are great, his memory is comprehensive and faithful, while his mind *teems* with the most luxuriant imagery, cloathed in the most elegant language, and strengthened by the most fortunate and brilliant figures.—The splendour of his *fancy* is unrivalled.—

led.—From science, from history, poetry, the passing moment, as well as that which is gone for ever, it collects and commands the most apt, varied, and beautiful images, to decorate his elocution. In the very tumult of eloquence, they instantaneously present themselves from the general miscellany of nature and things, like the soldiers of CADMUS, in compleat armour and array, to support the cause of their Creator.

Mr. ERSKINE with admirable dexterity, extracts testimony from the mouth of his witnesses, an art of the Profession, in which very few are successful; a general awkwardness is admitted; all sort of questions are commonly hazarded as they come uppermost; Counsel are often noisy and abusive, which is not only improper and unwarrantable, but very much affects the dignity of the Court. The mental, as well as the visual ray, (it has been sensibly observed) has its different refractions, according to the

different mediums, through which it passes; there is therefore a degree of uncertainty in the very nature of all human testimony. It often happens, that a witness of credit, and perhaps too, of good sense, knows not *how* to give his testimony; it requires to be skilfully *extracted* from him, which demands great sagacity, quickness of apprehension, and address; the effect of the testimony to be stifled, must be instantaneously seen, *with its bearing*, on every part of the case.—Mr. ERSKINE, it is observed, frames and arranges his questions, with a degree of dexterity, which always enables him to examine with effect.

It is certain, not only that Mr. ERSKINE has no equal at the Bar, but that as an Advocate, no one comes near enough to *contest* equality with him. He set out in the Profession with the ambition of CÆSAR, determined to be first, and his ardour has carried him
with

with a force that overleaped even the boundary he had assigned himself.

To judge *comprehensively* of Mr. ERSKINE'S professional powers, it would be proper to take a review of every important trial, during the last fifteen years. They would afford examples of eloquence, upon almost every important subject, and make a valuable collection of orations, to grace the same shelf that holds those of DEMOSTHENES and CICERO. A thousand instances might be produced to shew the wisdom and beauty of the moral principles they inculcate. To the writer who has not the various publications of the day at hand, (where many of them are miscellaneously detailed) it is left only to recite a sparing instance that strikes his memory at the moment, from the effect of the impression that remained on hearing it. How often does he display the true pathos of genuine eloquence, exploring every mine of ingenuity and invention, and
working

working upon the passions, by those masterly strokes of art so peculiar to himself, in pleading the cause of an injured husband, against the murderer of peace and happiness, the wretch who had blasted the honor of his wife.*

The following sentiment of Mr. ERSKINE, in one of his late speeches on the rights of juries, deserves to be recorded,

“ It was the first command (said he)
 “ and counsel of my youth, always to
 “ do what my conscience told me to be
 “ my duty, and to leave the consequences to God; I shall carry with me,
 “ the memory, and I hope, the practice
 “ of this parental lesson, to the grave;
 “ I have hitherto followed it, and have
 “ no reason to complain that my adherence to it, has been even a temporal
 “ sacrifice; I have found it on the contrary,

* See his speech in the action for crim. con. brought by Captain PARSLOE against SYKES.

“ trary, the road to prosperity and
 “ wealth, and I shall point it out as
 “ such, to my children.”

Mr. ERSKINE'S professional abilities have been exerted to the noblest purposes, he has ever been a warm and zealous defender of the Liberty of the Press, and the invaded Rights of Juries.—*See Notes (c) (d).**—His defence of the Dean of St. ASAPH, and of Mr. PAINE, will hand his name to posterity, foremost in the list of the most celebrated British Lawyers and Patriots. Like HOLT, he would never suffer himself to be deterred from the discharge of his professional duty, by any efforts of loud-tongued authority. Like the late justly celebrated

* See Mr. ERSKINE'S speeches.—The defence of the Bishop of St. ASAPH.—In defence of STOCKDALE.—And in defence of THOMAS PAINE—on prosecutions for libels.

These three celebrated speeches will be found to contain the compleat law and doctrine of libels, and the rights of Juries, in cases of libels.

celebrated Mr. DUNNING, he may be considered the People's Advocate, as he steps forward upon every occasion, in defence of the injured, of every description: To this conduct, if there is any instance, that looks like an exception, it is in the case of the prosecution for a libel against WITHERS, who, in consequence of it, lost his life and liberty in a prison. In this case, Mr. ERSKINE took the opposite side of the question; and certainly treated WITHERS with uncommon, not to say, unwarrantable acrimony; to this *unusual conduct*, Mr. ERSKINE was probably stimulated by the zeal of gallantry, and perhaps, somewhat dazzled for the moment, by the glittering brightness of rising prospects at Carlton House. In this solitary instance, this great Advocate, evidently lost his temper, as well as his argument; the zeal of professional duty, which is never so compleatly victorious, as when guided by moderation and coolness, was in the present instance, overpowered by
 anger,

anger, and in a great measure, defeated by passion.

“ The abuse of such an unprincipled
 “ ruffian, is believed by no one,” said
 Mr. ERSKINE. “ *If my assertions (re-*
 plied WITHERS) “ *meet with no credit,*
 “ *they are like the uninformed crudities*
 “ *and irrelevant rant of the Honorable*
 “ *Thomas Erskine, without conviction, and*
 “ *without effect; of course, they cannot*
 “ *injure any one, and my publication ceases*
 “ *to be a libel.*”

Book 1: 1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

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1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

1837-1838

NOTES.

Note (a.)

An ORATION delivered at CAMBRIDGE, by the Honorable THOMAS ERSKINE, on his taking the Degree of BACHELOR OF ARTS.

THESIS.

The English House of Commons arose gradually out of the Feudal Tenures, introduced at the Norman Conquest.

MANY of the warmest and wisest assertors of equal government, have been fond of looking back to Saxon Annals, for the origin of the British Constitution, and without the warrant of history or tradition, have considered the rise of our liberties under the Normans, as only the restoration of immunities subverted by the conquest.

This opinion, however, has been propagated by its authors, neither from a decided conviction on the one hand, nor a blind admiration of antiquity, on the other;

a very generous, but mistaken motive, has often rendered it popular and energetic; it has been opposed in times of public danger, to the arguments of those enemies to their country, and indeed to all mankind, who have branded the sacred privileges, wrested by our patriot ancestors, from the first Norman princes, as the fruits of successful rebellion.

But though the principle is to be applauded, the error cannot, and in this enlightened age, happily, need not be defended. The rights of mankind can never be made to depend on the times of their being vindicated with success; they are sacred and immutable; they are the gift of heaven, and whether appropriated for the first time to-day, or enjoyed beyond the reach of annals, the title of them, is equally incontrovertible. One individual may forfeit his property to another from supineness, and usurpation may strengthen into right by prescription, but human privileges in the gross, cannot be so snatched away. There is no statute of limitation to bar the claims of nature. Let us not, therefore, from a patriotic zeal, involve ourselves in the faint evidences of probability, but be contented to trace our political Constitution, from a source within the reach of moral demonstration. There is more honor in having freed ourselves from tyranny, than in having always been free.

We know for certainty, that the Saxons had Parliaments, but we know with equal certainty, that the people at large, had no representative share of them. The bulk of the nation were either *Vassals* under the feudal Lords, or *Allo-dii* under the King's government; the first being absolute slaves to their masters, could not pretend to become political

cal rulers ; and the last, being not even united by the feudal bond to the community, could have no suffrages in the feudal councils. The Saxon Lords indeed were free, but for that very reason, there was no public Liberty ; the Government was nearly Aristocratical, there was no shadow of that equal communion of privileges, founded on legislative institutions, which constitutes freedom upon English principles ; by which all who are the objects of the laws, must personally, or by representation, be the makers of the laws.

This principle, which may justly be denominated the very essence of our present Government, neither did, nor could possibly exist, till the proud feudal chieftains, bending under an accidental pressure, were obliged to sacrifice their pride to necessity, and their tyranny to self-preservation.—But before our inquiries can be properly begun, at the period I have fixed ; before I can exhibit the elastic force of freedom, rebounding under the pressure of the most absolute government, I must recall your attention to the genealogy of our feudal ancestors. They issued from that Northern hive of fierce warriors, that over-ran all Europe, at the declension of the Roman Empire ; a race of men the most extraordinary that ever marked or distinguished the state of nature : People, who in the absence of every art and science, carried the seeds of future perfection, in their national genius, a characteristic visible even then, in an unconquerable fortitude of mind, *in an inherent idea of human equality*, tempered with a voluntary submission, to the most rigid subordination. The *Trial by Jury* too, was understood, and received by all the Northern inhabitants of Europe, when they first appeared among the degenerate nations ; that had lost it. Liberty
driven

driven from the haunts of science and civilization, seems to have fled with this *Talisman* to desarts, and to have given it to Barbarians, to revenge her injuries, and redeem her empire.

In marking the process of the Constitution, through the furnace of slavery, it must never be forgotten, that *such* were our ancestors !

When WILLIAM had gained the victory of Hastings, he marched towards London, with his victorious Normans, and found, like other conquerors, an easy passage to the throne, when the Prince was slain, and his army defeated. The English proffered him the peaceable possession of a Kingdom, which he was in a condition to have seized by force; rather chusing to see the brows of a Victor enriched with a Crown, than a cap of mail; and wishing rather to be governed by the sceptre, than the sword. He was therefore installed with all the solemnities of the Saxon Coronations, and immediately after annihilated all those laws, which these solemnities were instituted to perpetuate; he established his own feudal system, the only one he understood; he divided all the lands of England, into Knight's Fees, to be holden of himself, by military service, and few or none of the English had any share in this general distribution, their estates being forfeited, from their adherence to HAROLD, and by their subsequent rebellions. It is plain they could have no political consequence, since none but vassals of the Crown, had seats in the feudal Parliament. Could WILLIAM have been contented to have thus shared with his Norman Barons, the spoils of the conquered English, and merely to have transferred his feudal empire from Normandy to Great Britain,

Britain, the sacred fun of freedom had probably then set never to have risen more; the Norman Lords would have established that aristocracy, which then distinguished the whole feudal world; and when afterwards, by the natural progressions of that singular system, when by the inevitable operation of escheats, and forfeitures, the Crown must have attracted all that property which originally issued from it; then the Barons themselves, would have dropped like falling stars, into the centre of power, and aristocracy been swallowed up in monarchy. The people already trained in subjection, without rights, and without even similar grievances to unite them, would have been an easy prey to the Prince, in the meridian of his authority, and despotism, who encircled with a standing army, could have scattered terror through a nation of slaves; but happily for us, WILLIAM's views extended with his dominions, he forgot that his Barons (who were not bound to leave their own country) had followed him, rather as companions in enterprize, than as vassals. Confiding in a standing army of mercenaries, which he recruited on the continent, he rivetted even on his own Normans, the greatest feudal severities, and before the end of his reign, the English saw the oppressors themselves, among the number of the oppressed. This plan pursued and aggravated by his successors, assimilated the heterogeneous bodies, of which the kingdom was composed. Normans, English, Barons, and Vassals, were obliged to unite in one common cause. Mr. DE LOLME has so clearly proved that Magna Charta was obtained from the necessity which the Barons were under of forming an union with the people, that I shall venture to consider it, as a fact demonstrated, and shall proceed to an enquiry, no less curious and important, where he and other writers have left a greater field for originality: I mean

mean the rise of the English House of Commons, to its present distinct and representative state. The statute of Magna Charta, so often evaded, and so often solemnly established, disseminated, it must be confessed, those great and leading maxims, on which all the valuable privileges of Civil Government depend; indeed, the 29th chapter contains every absolute right, for the security of which, men enter into the relative obligations of society; but privileges thus gained, and only maintained by the sword, cannot be called a Constitution: after bearing a summer's blossom, they may perish as they grew in the field of battle. Of little consequence are even the most solemn charters, confirmed by legislative ratifications, if they, who are the objects of them, do not compose that power, without whose consent, they cannot be repealed. If they have no peaceable way of preventing their infringement, nor any opportunity of vindicating their claims, till they have lost the benefit of possession; Liberty is not, in this state, an inheritance; it is little better than an alms from an indigent and a cautious administration: It therefore remains to shew by what steps, the People of England, without being drawn forth into personal action, were enabled to act with more than personal force; in what manner they acquired a political scale, in which they could deposit the privileges thus bravely and fortunately acquired, and into which, every future accumulation of power, flowing from the encrease of property, and the thriving arts of peace, might silently and imperceptibly fall; bringing down the scale, without convulsing the balance. And here those historians must be followed with caution, who have made this new order of the state to start up, at the nod of MONTFORD or EDWARD; neglecting the operations of the feudal system, as thinking them, perhaps, more the province of the lawyer,

yer than of the historian. They have mistaken the effect for the cause, and ascribed this memorable event to a certain political necessity, which was in reality prepared and ripened by a slow and uniform progression: this truth may be easily illustrated; the law of Edward the First still remains on the records of parliament, by which the Crown, and the Barons, in order to preserve for ever their feudal rights, refrained the creation of any new superiorities; by this act, the people were allowed to dispose of their estates, but the original tenure was made to follow the land through all its alienations; consequently, when the King's vassal divided his property by sales into smaller baronies, the purchaser had, from thenceforth, no feudal connection with the seller, but held immediately of the King, according to the ancient tenure of land; and if these purchasers alienated to others the lands so purchased, still the tenure continued, and remained in the Crown. Now, when we reflect, that every tenant of a barony, holden of the King *in capite*, had a seat in parliament, we see at once the striking operation of the law: we see too, how little the wisest politicians, foresee the distant consequences of ambition. Edward and his barons, by this device, monopolized the feudal sovereignty, and prevented their vassals from becoming lords like themselves.—But they knew not what they were doing.—They knew not, that in the very act of abridging the property of the people, they were giving them a legislative existence, which, at a future day, would enable them to overthrow whatever stood in the way of power, and to level that very feudal system, which they were thus attempting to perpetuate; for the tenants *in capite*, who had a right to be summoned to parliament, soon became so numerous by the alienation of the King's vassals (whose immense territories were divisible into lesser baronies) that they

neither could nor wished to assemble any longer in their own right. The feudal peers were, in fact, become the people; and the idea of representation came forward by a necessary consequence. Parliament, from being singly composed of men, who sat in their own right to save the great from the oppression of the Crown, (and not the small from the oppression of the great) now began to open its doors to the Patriot Citizen. The feudal and personal, changed into natural and corporate privileges; and the people, for the first time, in the history of the world, saw the root of their Liberties fixed in the centre of the Constitution. As the multiplication of Royal Tenures, from the enfranchisement of boroughs, but chiefly from the operation of this law, first gave rise to popular representation; so it is only in the continued operation of these principles, that we can trace the distinct existence and growing power of the House of Commons. We know that they assembled together, for a long time, in the same chambers with the Peers; that the separation was not pre-conceived by the Founders of the Constitution, but arose from necessity, when their numbers became too great to form one assembly; and we know that they never thought of assuming popular legislative privileges, till, by the necessary division, they became a distinct and separate body from the Lords. Thus, though a political accident, brought the English Commons forth into action, their legislative existence was the natural birth of the feudal system compressed by the Crown. To prove these truths, we have only to contemplate the history of our sister kingdom of Scotland, governed, at the same time, by the same laws; there being very little difference between the *regiam majestatem*, (the Scotch code of those days) and the work compiled by GLANVILLE, Chief Justice to HENRY II. The laws of EDWARD I. which produced

duced these changes in England, were translated by the Scotch Parliament into the Statute Book of their ROBERT I. but the King of Scotland had not conquered that country as WILLIAM had subdued England, consequently, he was rather a feudal Chieftain than a Monarch, and had no power to carry this law of EDWARD's into execution; for the Scotch Barons, although they would not allow their vassals to subinfeud, yet, when they sold their own lands, they would not suffer the Crown to appropriate the tenure, but obliged the purchasers to hold as vassals of themselves. By this weakness of the Scotch Crown, and power of the Nobles, the tenancies *in capite* were not multiplied as in England. The right to sit in Parliament was consequently not much extended beyond the original number, and Scotland never saw a House of Commons, nor ever tasted the blessings of equal Governments: when the boroughs, indeed, in latter days were enfranchised, they sent their representatives; but their numbers being inconsiderable, they assembled in the same house with the King and Lords, where, dazzled by the splendor of the Crown, and awed by the pride of the Lords, they sat silent in Parliament, representing the slavery, and not the freedom of the people. But *the dissemination of property* (which in every country on earth, is sooner or later creative of freedom) met with a severe check in its earliest infancy, from the statute of *entails*. In this instance, even the Crown of England had not sufficient strength to ripen that liberty which had sprung up from the source of its rays; for if EDWARD I. could have resisted this law, wrested from him by his Barons to perpetuate their estates in their families, the English Constitution, from an earlier equilibrium of property, had suddenly arisen to perfection; and the Revolution, in the reign of CHARLES I. had probably happened

two centuries higher in our History, or perhaps from the gradual circulation of that power, which broke in at last with a sudden and projected force, had never happened at all; but the same effects had been produced without the effusion of civil blood; for no sooner was this statute of entails shaken in the reign of HENRY VII. and finally destroyed by his successor, than we see the popular tide, which had ebbed so long, began to lift up its waves, till the mighty fabrics of prerogative and aristocracy, were washed away together in one ruin.

This crisis, which shallow men then mistook, and still mistake, for anarchy, was but the unconquerable spirit of Liberty, infused as early as Magna Charta, which, in working itself free from the impurities that oppressed it, was convulsing every thing around. When the fermentation ceased, the stream ran purer than before, after having, in the tumult, beat down every bank that obstructed its just and natural course. The consummation of those great events, is too recent and notorious to demand further illustration; their best commentary, is the happiness and freedom which we enjoy at this day. The subject proposed, is therefore brought to its conclusion; but it is a subject too dear and important to be concluded, without a reflection that arises very strongly out of it. The English Constitution will probably never more be attacked in front, or its demolition attempted by striking at the authority of the Laws; and if such an attack should ever be made, their foundations are too deeply laid, and their superstructure too firmly cemented, to dread the event of the contest.— But all this is not therefore safe; the centinels must not sleep; the authority of the laws themselves may be turned against the spirit which gave them birth, and the English
Government

Government may be dissolved with all the legal solemnities, which its *outward form* prescribes for its preservation. This mode of attack, is the more probable, as it affords respect and safety to the besiegers, and is infinitely more dangerous to the people, as the consciences of good men are answered by it. The virtuous Citizen, looking up with confidence to the Banners of Authority, may believe he is defending the Constitution and the Laws, while he is trampling down every principle of Justice on which both of them are founded. It is impossible, therefore, to conclude, without expressing a fervent wish, that every member of the community, (at the same time that he bows with reverence and respect to the Supremacy of the State, and the Majesty of the Laws) may keep his eyes for ever fixed on the Spirit of the Constitution, manifested by the Revolution, as the polar star of his political course; that while he pays the tribute of duty and obedience to Government, he may know when the reciprocal duty is paid back to the public and himself. This concluding wish is, I trust, not misplaced, when delivered within these philosophic walls. The sciences ever flourish in the train of Liberty. The soul of a Slave could never have expanded itself like NEWTON'S, over infinite space, and would have sighed in captivity at the remotest Barriers of the Creation. In no other Country, under Heaven, could LOCKE have unfolded, with dignity, the operations of an Immortal Soul, or recorded, with truth, the duties and privileges of Society.

Note (b.)

Mr. ERSKINE'S Speech in the Court of King's Bench, on behalf of Captain BAILIE, on the Charge of a Libel in the Affair of Greenwich Hospital.

MAY it please your Lordship to favour me, on behalf of this much injured Gentleman, Captain BAILIE, who, after forty years service, with honour to himself, and glory to his Country, is dragged into this Court, to answer as a Criminal, though guilty of no other crime, than that which, in the opinion of the Directors of Greenwich Hospital, is of the most enormous magnitude, "*The crime of an honest and conscientious discharge of his duty.*"

Had Captain BAILIE slept in his office, or had he been guilty of peculation, and joined in the general plunder, he would not have been brought before your Lordships this day as a delinquent, but probably would have been the confidential friend of the First Lord of the Admiralty, and might even have supplanted the Reverend Mr. COOKE, in his Lordship's favour.

My Lord, the intention of the establishment of Greenwich Hospital, was for *seamen*—that is the institution. The Charter says, "All the officers to be appointed in and for the said Hospital, shall be *seamen only.*" The words are precise

precise and positive, and can be neither explained away nor contradicted.

My Client, as Lieutenant Governor, is by the Charter a Member of the General Court of Commissioners and Governors, and also a Director; he is likewise a Member of the Council; and in the Governor, is Chairman of the two last Boards, and Commanding Officer in the Hospital. He was therefore impelled, by every tie of duty, to remedy the abuses, he complained of.

Captain B. my Lord, perceiving, in every department of the Hospital, most shameful plunder and peculation, finding landsmen introduced in express violation of the Charter; the provisions intolerable, the men's cloaths scantily provided, and upwards of thirty thousand pounds expended in eight years, in useless alterations, thought he should not do his duty by himself, by the seamen, and by his country, if he did not make those complaints, which, as an honest man, he was bound to make, and for which, every individual owes him thanks and reverence.

The Hospital being in this situation, he, as Lieutenant Governor, applied frequently to the First Lord of the Admiralty, but without effect; and at last, he presents to him the printed case, but, after many days were elapsed, he is told no answer would be given. He then applies to the Lords of the Admiralty, through the medium of the Secretary, with a respectful letter, and his printed case inclosed. It then became necessary something should be done, and therefore a mock Tribunal was instituted, which they thought proper to call a Court of Enquiry, a Court in itself illegal, because improperly constituted, and therefore

fore whatever was done in it, is nothing to the present purpose; for though a general Court was called, it thought it expedient to delegate the Enquiry to a Committee of Seven; which Seven are Directors.

The Commissioners and Governors ought to have selected a number of Governors of independent situations, who were not Directors; men of that description would have probed the business to the bottom; but instead of those, they were a packed Council for the occasion; and the Court of Enquiry consisted of the very Delinquents themselves.

Your Lordships will be astonished to hear, that the Committee sat in judgement upon their own crimes, and that those Gentlemen were appointed by the First Lord of the Admiralty. You will find, with an adroitness peculiar to himself, he selected a set of men, devoted to him for the bread they eat, which in part arises out of a fund appropriated for the use of disabled seamen, and to which the seamen themselves contribute.

How do they proceed? Captain BAILIE's witnesses are refused to be heard. He applies to the books; that he may have evidence from these unerring vouchers; the books are refused to be opened. He was brow-beat by their Council, and insulted by their Civil Officers, by a set of landsmen, in a manner that Gentlemen would blush to hear of, by MILNE the Clerk of the Works, and by COOKE the Chaplain. That a Clergyman should be so lost to all sense of decency, as to forget that decorum which more peculiarly belongs to *his* situation, makes me blush for the profession, of which he is an unworthy member. Had the
Directors,

Directors, who sat in the Court of Enquiry, been impartial, they would not have permitted a brave honest old seaman, to have been treated in that shameful way by men, who from profession and situation, were shielded from his resentment.

After the Committee had sat for some days, Mr. CUST, their Chairman, who appeared ashamed of their conduct and their cause, withdrew himself from the Committee; and Mr. BARKER, a Captain of a Collier, was called to the Chair. That man was mean and weak enough to say, that he was employed by Lord SANDWICH, and was to be paid for his labour. The labourer proved worthy of his hire, for in a few minutes there was an end to the Committee; this honourable man asserting, that evidence was immaterial, that it was libellous to doubt the integrity of the Directors, that he therefore should close the business without hearing those witnesses of Captain BAILIE's, which Mr. CUST had promised should be heard.

Your Lordships will observe, the reason this Court was not sooner applied to, in the language of the prosecutors affidavits, was, " We could not apply before, because the Court of Enquiry was not finished;" yet there is not a man upon that Court of Enquiry, that *dares* to say, the facts charged are disproved, or that any of the delinquents was not guilty of the crimes imputed to him. It would not, perhaps, be difficult to guess at the real person—but it is foreign to the present purpose. Perhaps a greater man than any of these, found himself attacked in another place, where, conscious of the truth of Captain BAILIE's charges, and of the impossibility of vindicating himself, he thought it would be prudent to avoid the enquiry, by

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asserting,

asserting, that it was to undergo a discussion in Westminster-Hall: that apology might silence the Peers; and he then, to save his credit, might order his minions to prefer this prosecution, not with the hope of success, but to save him from the enquiry he had so much reason to dread. Soon after this manœuvre had succeeded, and your Lordships had been applied to for information, Mr. Hicks, the Six-penny Receiver, who was one of the persons charged by Captain BAILIE, who is one of the prosecutors, and who sat in judgement upon him, at a general Court where Lord SANDWICH presided.—At that Court Mr. Hicks proposed, that Captain BAILIE should be removed from his employment of Lieutenant Governor. The noble Lord forgot, for a moment, the dignity of his station, and immediately called out, “ All you that are of that opinion, hold up your hands.”—Every dirty hand was immediately exalted, so that in five minutes, this brave old officer was tried, condemned, and executed.

My Lords, this sentence is, to Captain BAILIE, a very serious business, for it robs him of 600*l.* per ann. and if his wife should become a widow, she loses a pension of 100*l.* per ann. more; and he now stands before you, after being worn out in long and faithful services, an honest man indeed, but without a shilling in his pocket.

My Lords, taking the whole of this Case together, printed for the express purpose of giving information to those that wanted it, can this be called a Libel? Is it a Libel for a man to do his duty? Is it a Libel for a man to complain to those who have alone the power to redress the grievance?

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Let us state the particular parts of it, and see whether any thing can be collected that is Libellous?

With respect to the joint affidavit of the three Directors, the charge is, the Directors never presume to exercise their own judgement, but give their votes agreeable to the directions they receive; thereby insinuating, that the Directors were guilty of fraud, and did not vote according to their conscience. Is that insinuation justified by the charge?—Does it necessarily follow, that men who do not exercise their judgement, must act contrary to their consciences? or that they are guilty of fraud, because they obey the directions of others? Are the mandates of Lord SANDWICH so wicked, that obedience to them, is become criminal? These wretched affidavit men, appear to me to be the Libellers, not the Defendant, who has written the truth. There are a great variety of similar instances in their affidavits, (some of which were mentioned by the Counsel) even bits of sentences and half lines. I wish to read and to observe upon some of them; but it is impossible for me to see by this light, therefore I shall content myself with a few observations upon the whole purport of what the prosecutors say. So far as the charge tends to criminate me, I deny it.—*That* is the manner in which some charges are treated—*that* is the form—they swear this or that is not true, or that it does not criminate me. With what face then do the Gentlemen come here to make this application.—If it does not criminate, why do they make such application? If it does criminate them, they ought to be indicted for perjury, for all the charges are substantiated beyond a possibility of doubt, not only by the affidavit of Captain BAILIE, but by the concurring testimony of at least thirty others.

I trust these few observations, are complete answers to every part of these affidavits. I take upon me, to say, there is not a fact in the book, but what is positively proved; there is not a fact which they have attempted to deny.—I should therefore insult the Court, if I should suppose the Rule would not be discharged with Costs.

My Lords, when men come into this Court upon groundless applications, this Court will give Costs to the adverse party; for it would be extremely hard, indeed, for an innocent man to be dragged here to answer, at a great expence, a crime which had no existence, but in the malice of his Prosecutors. The amercing the Prosecutor in Costs, is founded on the same immutable Law of Justice, as that the innocent should not be harrassed without recompence, and that the wrong-doer should defray the expence he had occasioned. Who is at the expence of this prosecution?—I see many of the Prosecutors here.—Will they say it comes out of their own pockets? I see the Solicitor of Greenwich Hospital here, attending as their Attorney—he likewise is silent—then I am justified in saying, the Prosecutors are not to pay—let them deny it if they dare. Is it possible, my Lords, that these mens' expences shall be defrayed out of the Treasury of Greenwich Hospital, a Treasury appropriated to the most praise-worthy purposes, while this unhappy Gentleman is to be ruined by paying his own Costs, though he prevails against his Prosecutors who cannot, dare not deny the charges!

There is a technical expression—that every man should come into this Court with clean hands.—Which of the Prosecutors can claim the benefit of the expression? Is Mr. Hicks, the Six-penny Receiver, in that predicament? but
 enough

enough has been already said of him to convince your Lordships, *he* does not come with clean hands. In what light does Mr. Ibbetson appear? a mere clerk in office, who lifts his hand against a Lieutenant of the Hospital, and strikes a cripple who was without defence. This is not the only instance of his cruelty; for a poor helpless old pensioner, stands in judgement against him, whom he beat unmercifully, while bleeding at his feet. Are these the clean hands that come for informations, thus stained with the blood of the old, the impotent, and infirm! What can be said for the Reverend Mr. COOKE, that worthy leader of these disgraceful scenes, that negotiator of every thing that is infamous. It is proved beyond a possibility of doubt, that this man, (who is a director of a great establishment, who ought to have been the first to prosecute the contracting butcher) was the man that was shameless enough to apply to different persons, begging them to suppress their evidence against that Delinquent. Can there be a more atrocious act, than to suborn witnesses in favour of the Defendant, whom, as a Director and a Plaintiff in the Cause, he was bound to bring to Justice? This Reverend Mr. COOKE has been guilty of another act, that calls aloud for vengeance.—He told different Gentlemen, who were officers in the Hospital, “If you are seen with Captain BAILIE, Lord S—— will stop your preferment; and if he applies to Parliament, will expel him the Hospital;” at least his word should not gain credit, he stamped it with the sanction of an oath, saying, *By God it is true!* This the man who is called the Confidential Director of Lord SANDWICH—I vow to GOD I am ashamed to hear it; for it must be impossible, that a noble Lord should so far forget the dignity of his station, as to be connected with such a man, or to descend to such unexampled meanness, as to prevent

prevent Gentlemen from holding communication with Captain BAILIE, or threaten him with ruin, for persevering in his duty.

Mr. MILNE (the Clerk of the Works) thought proper to call the Lieutenant Governor a black-guard, and dared to strike one of the King's Lieutenants who is disabled, during the sitting of the Committee. A man, born with a trowel in his hand, a bricklayer, struck a Gentleman for giving evidence in the Court of Enquiry; yet these are the men that apply to your Lordships, and beg you will not discharge the Rule, but grant an Information against Captain BAILIE. *These* are the men, my Lords, that have acted (I am not ashamed to say) with equal infamy and meanness.—If ever men ought to be amerced in Costs, for bringing an ill-grounded Prosecution, they are now before the Court.

The Rules for shewing Cause why an Information should not be filed against Captain BAILIE, were discharged with Costs, to the entire satisfaction of an indignant audience.

Note (c.)

Note (c.)

CONCLUSION of Mr. ERSKINE'S SPEECH in the House
of Commons, as Counsel for the East India Company,
on the Declaratory Bill.

“ I HAVE now laid before you, all the principal reasons which induced and confirmed the opinion, I originally gave to the Directors of the India Company, concerning this extraordinary Bill, whose Authors are reduced to the wretched dilemma of being defeated upon every construction, which can possibly be put upon it; laughed at for ignorance if they fail, and disgraced by what is worse, if they succeed; for if, after all, my opinion be erroneous, and the Act of the 24th of the King, does in fact, bestow the powers which this Declaratory Bill supposes; if the dominion of this new commission, though masked under general and covert expressions, does nevertheless, in legal and well founded construction, subvert and annihilate every right, power, privilege, and authority, claimed and exercised by the Directors and Proprietors of the Company, under repeated charters, confirmed by repeated Acts of Parliament;—and to make a still larger concession—If the destruction of all those rights, were thought, by the Authors of the Bill that destroyed them, to be just and necessary, then, by what language shall I express the contempt and abhorrence, which in common
with

with all honest men, I feel for that low, mean, detestable hypocrisy, which to deprive others of the fame and advantage of carrying into execution, a great political work, availed itself of the prejudices, inseparable from such a project, and standing upon the fame of opposing, what they were themselves meditating, defeated the measure, defamed and displaced its Authors, by raising a clamour, that the chartered Rights of the Company were invaded; and by sounding through the kingdom, the alarm of parliamentary trust over the Directors, as a base, unprincipled attack upon private property, and utterly inconsistent with the first principles of a free government; offering to the deluded Company their own Bill, as their saviour and redeemer, reserving to themselves, the future exposition of it, which they have given to-day, at a time when it had lost all power in the country, and all support but their own.

“By this hypocrisy, whose adjectives I am too much exhausted again to detail, but which I leave my hearers to extract, by exhausting the most copious dictionary, some of the most excellent and illustrious persons in the kingdom, were driven from the highest stations in the government, the people of England set at war with their own representatives, the sacred revered privileges of this House bowed down, and sacrificed to the hereditary privileges of the Peers, and the prerogatives of the Crown and the Parliament of Great Britain, dissipated and dispersed; not by the stroke of the sceptre, but by the voice of a generous people, acting under an imposture, the grossest which the history of the world ever recorded of the most barbarous and credulous ages.

Indeed,

“Indeed, it will scarcely be believed, when time has made it matter of historical faith, that the English nation, and the East India Company, should have united under the banners of the Authors of that Act, to preserve those very rights, which we are now told, we are fools for not being able to read upon the face of it, that every one of them are absolutely and utterly taken away.

“Thank God, however, the veil has been for some time, beginning to fall off, and the business of to-day will tear it to pieces for ever; I hope, Sir, that it will afford a memorable lesson to the people of England, not to entertain rash or light jealousies of the fidelity of their own representatives, and not to indulge in the vain and drunken hope, that the other branches of the Constitution will be more propitious to their popular privileges, than their own friends and servants, who, by the most glorious and persevering struggles through every age of the government, have procured them at the price of their blood, and who enjoy them, along with them, as a common blessing; most of all, it will, I hope, be a solemn warning, not to expect from unknown, untried, unproved individuals, more integrity or wisdom, than is to be found in the collective representation of a whole nation; and that if, in future days, there shall arise any of those false CHRISTs, with a plausibility, which according to prophecy, might alone deceive the elect, they will set down their superiority of pretensions and professions, to self-sufficient pride, and domineering ambition, under that mask of hypocrisy, which cunning ever suggests to little minds, but which is as repugnant to the nature, as it is inconsistent with the dignity, of men who are born to rule over a free, brave, and enlightened people.

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“Sir,

“ Sir, the very enumeration of those bright qualities, which are necessary for the formation of a great Statesman, would present to my imagination, (if his presence did not offer to my senses) the image of my excellent Friend,* under whose auspices, I willingly acted, whilst a Member in this House; I enter with a just sensibility into his feelings at this moment, and anticipate the victory he must obtain to-day, whatever may be the event of your decisions; which, though they may declare, or repeal laws, cannot declare *shame* to be *honour*, nor repeal the memories and judgments of mankind, that are to distinguish one from the other.—My name too, Sir, happily indeed, sheltered by its obscurity, has, upon this subject, received its little portion of reproach, and comes in, therefore, to-day for its proportional share of triumph; I confess that it fills me with pride and satisfaction, to have been selected by the Proprietors of the East India Company, to defend those privileges, which I was branded for having violated, against those who assumed the characters of their preservers.

“ If therefore, the object of this Bill, which has so long laid concealed, be just and political, proceed to enact it, hear the East India Company against it, as they were before heard, when they prevailed, and then, whatever your judgments may be, they will be received with reverence and submission, nor shall I presume as a subject to murmur, or lift up my voice against them; but if instead of exercising that high legislative discretion, you proceed to declare that a law means, what language pointedly contradicts,

* Mr. Fox.

dicts, and what sound judgment revolts at, though I must certainly obey it, as you are pleased to expound it, yet I will not surrender to it, the evidence of my own understanding; I will continue to insist upon the justice of my opinion, I will publish it to the world, with the reasons on which it is founded, and submit the differences of our judgments, to an enlightened and impartial public."

Note (d.)

Mr. ERSKINE's Opinion of the Proceedings of the Court of King's Bench, in *Ireland*, by Attachments, written to a Gentleman, in high reputation at the Bar, in Dublin.

SIR,

Bath, January 13, 1785.

I FEEL myself very much honored by your application to me, on an occasion so important to the public freedom; and I only lament that neither my age nor experience are such, as to give my opinion any authority with the Court in which you practice; but wherever I have no doubts, I am always ready to say what I think; and you are, therefore, very welcome to my most public sentiments, if any use can be made of them.

You have very properly confined your questions to the particular case furnished by the affidavit, which you have transmitted to me; and my answers, therefore, need involve in them, no general discussions upon the principles of civil government, which in the mere abstract, are not
often

often useful, nor always intelligible.—The propositions, to which my answers are meant strictly to apply, are,

First, whether the facts charged by the affidavit, on which your Court of King's Bench is proceeding against the Magistrates of Leitrim, are sufficient to warrant a criminal prosecution for any misdemeanour whatsoever.

Secondly, whether, supposing them sufficient to warrant a prosecution by information or indictment, the Court has any jurisdiction to proceed by attachment.

As you are pushed in point of time, I can venture to answer both these questions at Bath, without the assistance of my books; because they would throw no light upon the first, from its frugality; and the last is much too clear to require any from them.

As to the first, the facts charged by the affidavit, do of themselves, neither establish nor exclude guilt in the defendants; in one state of society, such proceedings might be highly criminal; and, in another, truly virtuous and legal.

To create a national delegation amongst a free people, already governed by representation, can never be, under all circumstances, a crime; the objects of such delegation, and the purposes of those who seek to affect it, can alone determine the quality of the act, and the guilt or innocence of the actors.

If it points (no matter upon what necessity) to supersede, or to controul the existing governments, it is self-evident,

evident, that it cannot be tolerated by its laws. It may be a glorious revolution, but it is rebellion against the government which it changes.

If, on the other hand, it extends no further than to speak with certainty, the united voice of the nation to its representatives, without any derogation of their legislative authority and discretion; it is a legal proceeding, which ought not indeed, to be lightly entertained, but which many national conjunctures may render wise and necessary.

The Attorney General might, undoubtedly, convert the facts contained in the affidavit, into a legal charge of a high misdemeanour; which, when properly put into the form of an information, the defendants could not demur to: But he could not accomplish this, without putting upon the record, averments of their criminal purposes and intentions; the truths of which averments, are facts, which he must establish at the trial, or fail in his prosecutions. It is the province of the jury, who are the best judges of the state of the nation, and the most deeply interested in the preservation of its tranquility, to say, by their verdict, whether the defendants acted from principles of public spirit, and for the support of good government, or sought seditiously to disturb it. The one or the other of these objects, would be collected at the trial, from the conduct of the defendants, in summoning the meeting, and the purposes of it when met.

If the jury saw reason from the evidence to think, that its objects, however coloured by expressions the most guarded and legal, were in effect, and intended to be, subversive of government and order, or calculated to stir
up

up discontent, without adequate objects to vindicate the active attention of the public, they would be bound in conscience, and in law, to convict them.

But if, on the other hand, their conduct appeared to be vindicated by public danger or necessity, directed to legal objects of reformation, and animated by a laudable zeal for the honor and prosperity of the nation; then no departure from accustomed forms in the manner of assembling, nor any incorrect expressions in the description of their object, would bind, or even justify the jury, to convict them as libellers of the government, or disturbers of its peace.

To constitute a legal charge of either of these offences, the Crown (as I before observed) must aver the criminal intention, which is the essence of every crime; and these averments must be either proved at the trial, or, if it be inferred, *prima facie*, from the facts themselves, may be rebutted by evidence of the defendants innocent purposes. If the criminal intent charged by the information, be not established to the satisfaction of the jury, the information, which charges it, is not true: and they are bound to say so, by a verdict of acquittal.

I am therefore of opinion (in answer to the first question) that the defendants are liable to be prosecuted by information; but that the success of such prosecution, ought to depend upon the opinion, which the people of Ireland, forming a jury, shall entertain of their intention in summoning the meeting, and real *bona fide* objects, of the assembly when met.

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It is unnecessary to enlarge upon these principles, because their notoriety, has no doubt suggested this novel attempt, to proceed by attachment, where they have no place; and I cannot help remarking, that the prosecutor (if his prosecution be founded in policy of justice) has acted with great indiscretion, by shewing, that he is afraid to trust the people with that decision upon it, which belongs to them, by the Constitution; and which, they are more likely to give with impartial justice, than the judges whom he desired to decide upon it, at the expence of their oaths, and of the law.

This is a strong expression, which, perhaps, I should not have used in answering the same case, in the ordinary course of business; but writing to you, as a gentleman, I have no scruple in saying, that the judges of the Court of King's Bench, cannot entertain a jurisdiction by attachment, over the matter contained in the affidavit, which you have sent me, without such a gross usurpation, and abuse of power, as would make me think it my duty, were I a Member of the Irish Parliament, to call them to account for it, by impeachment.

The rights of the superior Courts to proceed by attachment, and the limitations imposed upon that right, are established upon principles too plain to be misunderstood.

Every Court must have power to enforce its own process, and to vindicate contempts of its authority, otherwise the laws would be despised, and this obvious necessity, at once produces, and limits the process of attachment.

Wherever

Wherever any act is done by a Court, which the subject is bound to obey, obedience may be enforced, and disobedience punished by that summary proceeding. On this principle, attachments issued against officers for contempts in not obeying the process of Courts, directed to them as the ministerial servants of the law, and the parties on whom such process is served, may in like manner be attached for disobedience.

Many other cases might be put, in which it is a legal proceeding, since every act which tends directly to frustrate the mandates of a Court of Justice, is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, viz. that it can only issue in cases, where the Court, which issues it, has awarded some process, given some judgment, or done some act which the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, excited others to defeat by artifice or force, or treated with terms of contumacy or disrespect.

But no crime, however enormous, even open treason and rebellion, which carry with them a contempt of all Laws, and the authority of all Courts, can possibly be considered a contempt of any particular Court, so as to be punished by attachment, unless the act, which it is the object of that punishment, be in direct violation of, or obstruction to something previously done by the Court which issues it, and which the party attached was bound by some antecedent proceeding of it, to make the rule of his conduct.—A constructive extension of contempt beyond the limits of this plain principle, would evidently involve every

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misdemeanor,

misdemeanor, and deprive the subject of the Trial by Jury, in all cases where the punishment does not extend to touch his life.

The peculiar excellence of the English Government, consists in the right of being judged by the country in every criminal case, and not by fixed Magistrates appointed by the Crown. In the high order of crimes, the people alone can accuse; and without their leave distinctly expressed by an indictment found before them, no man can be capitally arraigned; and in all the lesser misdemeanors, which either the Crown or individuals borrowing its authority may prosecute, the safety of individuals, and the public freedom, absolutely depend upon the well known immemorial right, of every defendant, to throw himself upon his country for deliverance, by the general plea of, Not Guilty. By that plea, which in no such case can be demurred to by the Crown, or questioned by its Judges, the whole charge comes before the Jury on the general issue, who have a jurisdiction co-extensive with the accusation, the exercise of which, in every instance, the authority of the Court can neither limit, supersede, controul, or punish. Whenever this ceases to be the Law of England, the English Constitution is at an end; and its period in Ireland is arrived already, if the Court of King's Bench can convert every crime by construction into a contempt of its authority, in order to punish by attachment. By this proceeding, the party offended is the judge; creates the offence without any previous promulgation; avoids the doubtful and tedious ceremony of proof, by forcing the defendant to accuse himself, and inflicts an arbitrary punishment, which, if not submitted to, and revered by

by the Nation as Laws, is to be the parent of new contempts, to be punished like the former.

As I live in England, I leave it to the Parliament and People of Ireland to consider what is their duty, if such authority is assumed and exercised by their Judges. If it ever happens in this country, I shall give my opinion.— It is sufficient for me to have given you my judgement as a lawyer, upon both your questions; yet as topics of policy can never be misplaced, when magistrates are to exercise a discretionary authority. I cannot help concluding with an observation, which both the Crown and its Courts, would do well to attend to, upon every occasion.

The great objects of criminal justice, are reformation and example, but neither of them are to be produced by punishments, which the laws will not warrant: on the contrary, they convert the offender into a suffering patriot; and that crime which would have been abhorred for its malignity, and the contagion of which would have been extinguished by a legal prosecution, unites an injured nation under the banners of the criminal, to protect the great rights of the community, which in his person have been endangered.

These, Sir, are my sentiments, and you may make what use of them you please. I am a zealous friend to a Reform of the Representation of the People, in the Parliaments of both Kingdoms, and a sincere admirer of that spirit and perseverance, which in these days, when every important consideration is swallowed up in luxury and corruption, has so eminently distinguished the people of your country. The interests of both Nations are, in my opinion, the

same; and I sincerely hope, that neither ill-timed severity on the part of Government, nor precipitate measures on the part of the People of Ireland, may disturb that harmony between the remaining parts of the Empire, which ought to be held more sacred, from a reflection on what has been lost.

I have the honor to be,

SIR,

Your obedient

Humble Servant,

THOMAS ERSKINE.

JAMES

JAMES MINGAY, Esq.

DEMOSTHENES tibi præripuit ne *primus* esses Orator, tu
illi ne *solus*!

THE Man who is, as it were, his own *Creator*, and *forces* the passes of public life, in a peculiar degree, excites and interests public curiosity. There are in truth, few objects of speculation more pleasing to a liberal mind, than a man who is winning his way from obscurity to fortune, by the force of his own merit; the pleasure is great, of viewing the natural efforts of genius, rising from one degree of excellence to another: That tide, which taken at the height,

height, leads on to fortune, continually escapes the fond attention of numbers, who might have been borne by its flood, to all they wished of honor, wealth, and greatness, and being unable to recover the transient opportunity, must be content to sigh out the rest of their days, in a comparative degree of unmerited obscurity ; while others, without ambition, without attention, without expectation, and sometimes with very slender pretensions to merit, find, as it were, intrusive opportunities of embracing fortune, wherever they turn : Thus it is, that the race is not always to the swift, nor the battle to the strong ; and what may appear still more extraordinary, that there is not always bread to men of skill and understanding. The whole of rational nature, must feel the allotments of time and chance, and are compelled to acknowledge, the force of their irresistible influence.

As

As a public man, Mr. MINGAY not only stands in the first rank, but is generally admitted the *second* person in professional estimation—As it were by common consent, Mr. ERSKINE is the first.

The attractive power of curiosity operates with almost infinite force upon such a character as Mr. MINGAY ; every kind of anecdote is greedily coveted, even to tearing the veil that covers the sacred retreat of private life, and which ought to be obliterated in the silent retreat of domestic obscurity. Such however as are prompted to the perusal of these sheets, by the thirst of such a passion, will meet the disappointment they merit.

Mr. MINGAY's parentage, though not splendid, is respectable.—His father is a
surgeon

surgeon of acknowledged ability at Thetford, in the county of Norfolk.

The Duke of GRAFTON was his patron, and is said to have become so, in consequence of the dreadful accident that befel Mr. MINGAY in his youth, by which he had the misfortune to lose an arm. In the goods of fortune, Mr. MINGAY'S share must have been very small.—From the scantiness of it, and a contemplation of the very little prospect earlier days afforded of his present elevation, *this* reflection naturally presents itself—namely—the happiness it must afford an aged parent, to see his child, by the efforts of his own merit, attain, from the most humble obscurity, the most distinguished eminence, as well as the transport it must yield a man of sensibility, to return to the dwelling of his parent, and embrace him adorned with the laurels he had earned! Wealth and honors, in all their abundant stores, have

have no other *pledge* so rich in human happiness !*

After passing the allotted time at Cambridge, Mr. MINGAY perched on the desk of a special Pleader, and having drawn pleadings some short time, under the present Serjeant RUNNINGTON, was, immediately after the necessary term of keeping commons, called to the Bar, from the Society of the Inner

* VIDA, the celebrated Poet, was deprived this satisfaction, but is placed higher in our esteem, by the following anecdote, than even by that classic composition, that rivals the Art of Poetry, of his great Master.

JEROME VIDA after having long served two Popes, at length obtained the Episcopacy. Arrayed in the robes of his new dignity, he prepared to visit his aged parents, and felicitated himself with the raptures the old couple would feel, on embracing their son, as their bishop. When he arrived at their village, he learned, that it was but a few days since, they were no more.—His sensibility was exquisitely pained; the muse, elegantly querulous, poured forth her sublimest strains upon the occasion; and, in the sweetest pathos, deplored the death and disappointment of his parents.

ner Temple, when he declined the drudgery of the draughtsman.—It was Columbus at the oar !

Mr. MINGAY almost immediately distinguished himself, and had a considerable share of business, particularly *sessions* business, where he was a constant and indefatigable attendant. His figure is manly, majestic, and commanding.—His manner bold, confident, and authoritative ; his mode of speaking, prompt, copious, clear, and rapid.—He possesses great strength of mind—strength of lungs, strength of nerves and—*strength of countenance* ! Transcendent abilities, quick scholastic attainments, elegant classical taste ; a strong and poetical imagination, Mr. MINGAY *does not possess* ; nor are they absolutely necessary to success in the Profession. His auditors are sometimes hurried away, by a strong stream of natural eloquence, but no flowers float with them. Mr. MINGAY's readiness and adroitness in examining

ning a witness, is admirable, and well adapted to detect prevarication, and draw forth reluctant facts; in doing which, he is often eminently successful.

So many strong claims to popular patronage, could not fail bringing him into extensive practice. Like his Competitor, Mr. ERSKINE, his popular talents introduced him to a wide field of public business, before time and experience could possibly have afforded him opportunities of acquiring any very great stock of legal knowledge. Great and extensive practice is, however, found to be synonymous with a very considerable degree of legal information, and it is a happiness peculiar to this Profession, that a man is *paid* for the knowledge, he thus progressively acquires.

The silk gown soon rewards superior legal eminence, and was in consequence soon seen to decorate the person of Mr. MINGAY; and as this

honor also gave him rank as a leader, Mr. MINGAY was generally pitched upon to oppose Mr. ERSKINE; and, from this period, causes were seen supported in the Court of King's Bench, with a much more *comparative* equipoise of abilities, instead of the unequal combat, before so often witnessed, of dry law erudition, and dull reasoning, contained in tame phlegmatic nerveless periods, against superior powers of argumentation, aided by vehement impassioned declamation, if there still remained a superiority, it was neither so great nor so easily earned. Mr. ERSKINE was compelled to exertion, and could never sleep a moment at his post, without danger of surprize. The confident, rapid, daring declamation of Mr. MINGAY, was often little inferior, in effect, to the more polished, classic harangues of Mr. ERSKINE; though less Ciceronian, they always *told* before an unenlightened Jury, and forcible impressions remained, on minds, incapable of following the eagle flights of his more ardent

ardent and accomplished opponent.—Mr. MINGAY's strong, though often uncorrect metaphors, his frequent mutilated periods, hasty digressions, and forcible repetitions, would not so well adorn the printed page, as the highly finished, though spontaneous performances, of Mr. ERSKINE; but their effect on a Jury is great, and has, of course, been strongly conducive to Mr. MINGAY's success in practice.

Mr. MINGAY is frequently happy in quotation, and in his *method* of pleading, a thing very different from the mechanism of placing one part of a speech before or after another.—Clearness and energy are the characteristics to which his eloquence lays claim. Nothing can be clearer, than his *definitions*.—He *fixes* the state of the question, and the point he means to combat. His speeches are not *skirted* with that brilliancy of imagination, that rich copiousness so pre-eminently distinguishable in Mr. ERSKINE; but

but their force and clearness give them a powerful effect. He never fatigues the mind, or tires his auditors. When it is his business to announce and impress truth, to discover fraud, to screen innocence, or protect integrity, he is equal to the task of combating and unveiling insidious sophistry, refuting objections, topping off the luxuriances that darken a question, stripping a subject of the accessions that impede its progress, and forcing the uncandid antagonist to bend to the unclouded radiancy of truth. He never pours out a deluge of words, without saying what is conclusive, and coming to a point.—He is a good *limner* of character.

Many eminent writers have expressed themselves in favor of that *diffidence*, which is said to throw a soft and winning grace over all actions done under its influence. CICERO says, he often trembled in voice and limb, when he began to speak. The celebrated Mr. DUNNING,
was

was at the outset of his professional life; in a similar predicament; upon occasion of opening a Case in the House of Commons, so totally had fear and diffidence overpowered his faculties, that he conceived himself holding in his hands, not his Brief, but a roll of white paper, caught up by mistake, and, under the impression of that idea, was obliged to retire from the Bar. Mr. MINGAY is always ready, and never the victim of perplexity, feeling nothing of the *multum sanguinis, multum verecundiæ, multum sollicitudinis in ore*; and it is believed, is so far from having been embarrassed by similar sensations, that he would probably be more puzzled to account for their possible existence, than by any case his clients ever laid before him. He is supposed to have much the same ideas of diffidence, that a blind man has of colours, or a deaf one of sounds. Many young men are lost from the effect of insuperable timidity;

dity; every Term witnesses some victim from this cause. It is not uncommon to see a young man, on his first rising to speak in Westminster-hall, affrighted at the sound of his own voice, like a raw recruit starting at the report of his own musket.

The "*Æs frontis triplex*"—The "*Ferræi frontis audacia*," is of eminent utility in this profession. Many have been known to fail from the want of it, and more to succeed from the possession of almost that single qualification.

MENANDER calls *impudence* the greatest of *deities*; and if the law has any tutelary divinities*, impudence is one of them.

OSBORNE

* Saint EVONA, a Lawyer of Britain, went to Rome, to intreat the Pope to give the Lawyers a Patron; the Pope replied, that he knew of no Saint but was disposed of to some other profession. His Holiness proposed, however, to Saint EVONA, that he should go round the Church of *San Giovanni di Laterano* blindfold, and after saying a certain

OSBORNE says, though it is no virtue, it is able to *beggar* them all, being, for the most part, in good plight, when the rest starve, and capable of carrying her followers up to the highest preferments, as useful in a Court, as armour in a Camp. In the abundant possession of this qualification, as well as in many other respects, Mr. MINGAY is said to bear no small resemblance to the late great Advocate, Lord GRANTLEY, better known by his former title of *Sir Fletcher Norton*, or that which he adopted in practice, *Sir Bull Face Double Fee*.

A very severe indisposition called Mr. MINGAY a few years since, a long time
from

certain number of Ave Marias, the first Saint he laid hold of should be his Patron. This the good old Lawyer undertook, and at the end of his Ave Marias, stopped at the altar of Saint MICHAEL,—where he laid hold, not of the Saint, but of the Devil under the Saint's feet, crying out—This is our Saint, let him be our Patron! The old man is said to have taken his disappointment so much to heart, that he died of grief.

from practice ; and, as the run of professional business is known so materially to depend upon a constant attendance of the Courts, the continuance of so much practice, after so long an interval of secession, is alone a strong proof of the possession of superior abilities, and very high professional estimation.

18 JA 53

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